

The Cape Coral District of Browning-Ferris Industries of Florida, Inc. and Thomas Lento and Robert Giarrusso. Cases 12-CA-13923 and 12-CA-13924

March 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 11, 1991, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed and withdrew limited exceptions and an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility findings, we note in addition to his observation of the demeanor of witnesses, his strong rejection of the Respondent's witnesses' testimony, which he variously characterized as "blatant fabrication," "phony," "stilted," "bad faith," "less-than-credible," and "unpersuasive." We note that Shop Maintenance Manager Canady vacillated in his testimony on the oral or written warnings he alleged that he had given to Giarrusso. We also find discrepancies between Canady's sworn statements and his sworn testimony as to what Giarrusso said to him when he received his written warning, and about what Lento allegedly said about being "tired of driving" as compared with "tired of throwing garbage." We also note the discrepancy between employee Blackburn's testimony that he had told Route Supervisor Tillman on April 9 that he needed to leave early the next day to go to court and his pretrial statement that he asked Tillman on April 10, sometime after noon, if he could leave early to meet with his lawyer. Blackburn was unable to provide any documentation that he had gone to court. Finally, we find Operations Manager Briggs' and District Manager Wynberg's testimony contrived. They testified that Lento had his uniforms with him when he returned at 2 p.m. on April 11; and yet Briggs then sent him a letter the next day telling him to bring in his uniforms. In any event, although as the judge acknowledged there are some unanswered questions about the discharge, we agree with the judge's findings that the General Counsel proved by a preponderance of the evidence that Lento's union activities were a motivating factor in the Respondent's discharge of him and that the Respondent failed to show that it would have discharged Lento even in the absence of Lento's union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Cape Coral District of Browning-Ferris Industries of Florida, Inc., Cape Coral, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Eduardo Soto, Esq., for the General Counsel.

Grant D. Petersen, Esq. (Haynsworth, Baldwin, Johnson & Harper), of Tampa, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a discharge case. Finding merit to the Government's allegations that the Company discharged Robert Giarrusso and Thomas Lento because of their support for Teamsters Local Union No. 79, I order the Company to offer the two discriminatees immediate reinstatement and to make them whole, with interest.

I presided at this hearing in Fort Myers, Florida, July 8-9, 1991, pursuant to the November 29, 1990, amended consolidated complaint (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 12 of the Board. The complaint is based on charges filed April 16, 1990, by Thomas Lento (Lento) in Case 12-CA-13923 and by Robert Giarrusso (Giarrusso) in Case 12-CA-13924 against The Cape Coral District of Browning-Ferris Industries of Florida, Inc. (Respondent, the Company, or Cape Coral).¹ At the beginning of the hearing two other cases, and related complaint allegations, were severed and remanded to the Regional Director for further processing. (Tr. 1:7-10.)²

In the complaint the General Counsel alleges that Respondent Cape Coral violated Section 8(a)(1) of the Act, between February 11 and April 11, by interrogating employees about their union activities and sympathies, promising them improved conditions, higher wages, and promotions if they abandoned their support of the Union, and impliedly threatening to discharge them because of their union activities; and Section 8(a)(3) of the Act, by issuing a written warning to Robert Giarrusso about March 12, by discharging and/or constructively discharging Giarrusso on the same date, and by discharging Thomas Lento about April 11, 1990.

By its answer the Company admits certain factual matters, denies discharging Giarrusso and Lento, and denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

¹ All dates are in 1990 unless otherwise indicated.

² References to the two-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's and R. Exh. for Respondent Company's.

FINDINGS OF FACT

I. JURISDICTION

A Florida corporation, Respondent Cape Coral operates a waste management facility at Cape Coral, Florida.³ During the past 12 months, the Company purchased and received at its Cape Coral facility goods and services valued at \$50,000 or more directly from points located outside Florida. (Tr. 1:11.) The Company admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

The Company admits (Tr. 1:11), and I find, that Teamsters, Chauffeurs and Helpers Local Union No. 79, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.⁴

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Management

Larry Wynberg is district manager for the Fort Myers District and the Cape Coral District, the latter including the North Fort Myers satellite. (Tr. 2:280–281.) The district names apparently take the names of companies BFI has acquired, for Wynberg refers to the Fort Myers Company (Tr. 2:280, 313) as well as to the Cape Coral Pine Island Disposal Service, Inc. (Cape Coral). (Tr. 2:281–282.) The parties stipulated that BFI acquired Cape Coral on June 1, 1989. (Tr. 1:18–20.) Wynberg's superior, Regional Vice President Neil Clark, is located at BFI's Southeast Regional Office in Atlanta, Georgia. (Tr. 2:273, 305, 323, 330.)

Norman James was the "company manager" reporting to Wynberg until his March 12, 1990 termination. (Tr. 1:12; 2:300.) Although a witness to one or two matters, James is not prominent in the evidence, and he did not testify. Martin Ring, briefly mentioned in the evidence, is the operations manager at the Fort Myers District. (Tr. 2:308, 312.) The events in this case occurred in the Cape Coral District.

David Briggs has been the operations manager at Cape Coral since April 2, 1990. (Tr. 2:263, 297.) Briggs' predecessor, Roger Edwards, stipulated to have been a statutory supervisor, was terminated March 12, 1990. (Tr. 1:12.) Edwards did not testify. Wynberg hired Briggs who transferred from another BFI location. (Tr. 2:261–262, 297, 299.) Working for supervisors reporting to Briggs, alleged dischargee Thomas Lento drove a disposal truck for Cape Coral. (Tr. 1:26.)

Charles Canady is Cape Coral's shop maintenance manager. (Tr. 2:221.) Canady reports to Wynberg or, when he

was there, to Norman James. (Tr. 2:241, 300.) Alleged dischargee Robert Giarrusso worked as a maintenance utility person under Canady's supervision. (Tr. 1:98–99; 2:222.)

2. Acquisition barbecue

Shortly after the Company acquired the Cape Coral facility, it sponsored a barbecue with the acquired employees and their wives for the purpose of mutual introductions and to permit Wynberg to explain the Company's medical coverage and other benefits. Wynberg there announced the Company's plan to increase the employees' wage levels beginning immediately, with a pay review scheduled for November or December 1989 and again in April and October 1990. (Tr. 2:290–293.) Lento recalls the barbecue, but was unable to confirm or deny the part about wage increases. (Tr. 1:65–66.) The General Counsel offered no evidence contradicting Wynberg.

Wynberg also testified that at the June 1989 acquisition of Cape Coral he instructed the operations manager to begin equalizing the routes so as to achieve fairness of the workloads, presumably also in relation to the time required. (Tr. 2:288.) This goal, also part of a 2-year plan by Wynberg, apparently was described at the barbecue.

3. Union organizing campaign

In February 1990 Cape Coral driver Thomas Lento contacted Kenneth W. Wood, secretary-treasurer of Teamsters Local 79. A first meeting was held on Saturday, February 10, at a local park with some 25 to 27 employees attending. Authorization cards were signed. On February 27 the Union, by Wood, filed a petition in Case 12-RC-7265 to represent the Cape Coral employees, estimated to be 31 in number. (G.C. Exh. 2.) By letter (G.C. Exh. 5) dated March 30, Wood advised Wynberg that 10 named employees (with Lento as the first name) were assisting the Union in an organizing campaign, and warned Wynberg not to violate the legal rights of the employees. Wynberg received the letter on April 2. (Tr. 1:17, 26–31.) Wynberg acknowledges that as of Lento's alleged discharge on April 11 (the Company contends Lento quit), he was aware that Lento favored the Union. (Tr. 2:329.)

The Union won the April 18 election by a vote of 24 to 15, with 3 challenged ballots (G.C. Exh. 3), and on May 2, 1990, the Acting Regional Director for Region 12 certified Teamsters Local 79 as the exclusive bargaining representative of the Company's employees in the following unit (G.C. Exh. 4):

All full-time and regular part-time drivers, helpers, mechanics, and warehousemen at the Employer's facility located at 1112 Southeast 9th Lane, Cape Coral, Florida; excluding all other employees, guards and supervisors as defined in the Act.

The parties stipulated that the Company and Local 79 have signed a 1-year collective-bargaining agreement, effective March 1, 1991, through February 29, 1992, covering the certified unit. (Tr. 1:15–16.)

³ Respondent presumably is a subsidiary of Browning-Ferris Industries. The latter's home office is in Houston, Texas. (Tr. 2:330.) Unless otherwise indicated, in this decision I use "BFI" as a shorthand reference for the parent or overall corporate organization.

⁴ News items and reports indicate that effective June 28, 1991, the international union shortened its name to the International Brotherhood of Teamsters, AFL-CIO.

B. *Allegations of 8(a)(1) Coercion*

1. February 11, 1990, by Roger Edwards

a. *Allegation*

Complaint paragraph 5 alleges that about February 11 Roger Edwards “interrogated employees concerning their union membership, activities, and sympathies.” Robert Giarrusso testified in support of this allegation.

b. *Facts*

Maintenance employee Robert Giarrusso began work for the Company in 1988. (Tr. 1:98.) At the initial organizational meeting of Saturday, February 10, Giarrusso signed an authorization card. (Tr. 1:100.) Giarrusso testified that about 3 p.m. the following Monday, February 12, then Operations Manager Roger Edwards, in the driveway outside the mechanic shop, asked Giarrusso why he was causing all the union problems. Denying that he was causing any union problems, Giarrusso asserted that if he became the shop steward, Edwards “would be the first one I’d come after legally.” (Tr. 1:100–101, 118–119.) Hired by Edwards in 1962, back hoe operator Theodore Bell was a witness to the conversation and confirms the version of Giarrusso. (Tr. 1:101, 135–37.)

Before his employment with Cape Coral, Giarrusso was a member of Teamsters Local 560 (New Jersey, apparently) for 28 years. (Tr. 1:99.) Giarrusso and Norman James, the company manager, had a history of engaging in banter with each other about union matters before February, but that ceased after February 10. Giarrusso did not joke with Edwards, and they were serious in their conversation of February 12. (Tr. 1:99, 119–120.) As I have mentioned, neither James nor Edwards testified.

c. *Conclusions*

Both Giarrusso and Bell testified persuasively about this matter, and I credit each.

Edwards made but a single interrogatory of Giarrusso on this occasion. Whether the initial portion of Giarrusso’s answer satisfied Edwards, or whether the pit-bull character of the rest of Giarrusso’s response intimidated Edwards, I need not decide. The test of lawfulness is the tendency to coerce, not whether a supervisor or manager succeeded in coercing. Edwards impliedly inquired about the first union meeting. There is no evidence that Giarrusso had announced his attendance. The meeting was not a topic management was at liberty to interrogate an employee about. Indeed, the nature of the question would create the impression of management surveillance of union activities. (The complaint contains no allegation of creation of impression of surveillance.) Finding that Edwards’ question had a tendency to coerce, I find, as alleged, that the Company violated Section 8(a)(1) of the Act by such interrogation.

2. April 4, 1990

a. *Allegations*

Complaint paragraph 6 alleges that about April 4 David Briggs “interrogated employees concerning their union mem-

bership, activities, and sympathies.” Thomas Lento testified in support of this allegation.

Complaint paragraph 7 alleges that about April 4 David Briggs “promised employees better working conditions, higher wages, and promotions if they would abandon their support of and activities on behalf of the Union.” Lento also testified in support of this allegation.

b. *Facts*

After visiting Cape Coral in March and interviewing with Wynberg, Briggs arrived on April 2 to begin work. Spending his first day in the office, on April 3 Briggs began riding with drivers on their routes, riding with about half of the 35 or so drivers over the next 2 to 3 weeks. (Tr. 2:263, 272–273.) Thomas Lento testified that when Briggs was introduced to the drivers, the drivers were told that Briggs had transferred there to solve problems and that he would be riding with them over the next 3 weeks to talk with them and learn about any problems. (Tr. 1:32.)

Briggs rode with Lento on April 5. Briggs asserts that he first spoke of family, his own career at BFI of driver to manager, and that Lento also could progress from driver to manager. (Tr. 2:266, 272–273.) Lento agrees that Briggs first asked about family, but after that Briggs asked what Lento thought about the Union. Lento said he thought the Union is good. (Tr. 1:34, 67–68.) Briggs concedes this much and admits that he asked other employees (presumably those with whom he rode) the same question. (Tr. 2:266, 272.)

After he responded that the Union is good, Lento testified, Briggs cautioned him to “think hard” because Briggs would make changes, that he would raise salaries, and that BFI would try to cut the workdays from 5 to 4 by adding more trucks. Briggs added that Lento could move off the truck and into management. “Look, I’m not really interested,” Lento replied, saying that he was happy with his work as a driver. (Tr. 1:34, 68.)

Briggs denies telling Lento he would be given a management position if he stopped his union activities. (Tr. 2:267.) Other than discussing company benefits, such as medical coverage and retirement, Briggs asserts that he did not discuss a possible improvement in salaries. He did, however, discuss an improvement in routes. (Tr. 2:273.)

c. *Analysis and conclusions*

As mentioned, Thomas Lento is one of the 10 employees named in the Union’s March 30 letter to the Company as assisting in the organizing campaign. Briggs’ question of Lento, on what Lento thought of the Union, may have been silly, but it does not appear to have been unlawful. Lento was an openly announced supporter of the Union, and he represented that position to Briggs. Although Briggs asked other employees the same question (Tr. 2:272), the number or identity is not given. For all we know, they were the others named in the Union’s letter. Accordingly, I shall dismiss complaint paragraph 6.

The Company defends against the promises allegation on the basis that Briggs was doing nothing more than reaffirming what Wynberg had told the employees in June 1989 and already had implemented by pay raises. However, Wynberg’s announcement and subsequent pay raises were to employees as a group—a group benefit. Briggs was seeking

to entice Lento with an individual promotion with the implication he would get it by abandoning his support of the Union.

Although Wynberg apparently had announced a goal of equalizing routes, there is no evidence that any specific program ever was adopted, much less announced. Nearly a year had passed. As Lento testified, some things Wynberg mentioned were never implemented. (Tr. 1:65–66.) In the context of the inquiry about the Union, Briggs' statements about adding trucks and reducing the workload must be viewed as an inducement to abandon support of the Union. Even though in June 1989 Wynberg had announced a goal of increasing the pay, Briggs' mention to Lento of raising salaries would naturally tend to suggest an individual increase for Lento, and any others forsaking the Union, or else a link between what the employees must now do if they were to receive the future increases Wynberg had mentioned months earlier. In these circumstances, finding merit to complaint paragraph 7, I further find that the Company violated Section 8(a)(1) of the Act, as alleged.

3. April 11, 1990, by Larry Wynberg

a. Allegation

Complaint paragraph 9 alleges that about April 11 Larry Wynberg "impliedly threatened to discharge employees because of their support of and activities on behalf of the Union." Thomas Lento testified in support of this allegation.

b. Description postponed

Because the facts of this conversation are part of the events of Lento's alleged termination, I defer the summary until my description of the termination allegation.

C. Allegations of 8(a)(3) Discrimination

1. Robert Giarrusso

a. Allegations

Complaint paragraph 11 alleges, and the Company admits, that about March 12 the Company, by Charles Canady, issued a written disciplinary warning to Robert Giarrusso. The question is whether, as alleged in paragraph 13, the Company did so because of Giarrusso's union activities.

Complaint paragraph 12(b) alleges that about March 12 the Company "discharged and/or constructively discharged" Giarrusso. the Company denies the allegation.

b. Facts

The week of Monday, February 26, 1990, Robert Giarrusso was on vacation, returning to work Monday, March 5. At the hearing Giarrusso recalled that his vacation was the week of March 5, returning March 12. (Tr. 1:101–102, 112.) That is consistent with his April 18 pretrial affidavit. (Tr. 1:116–117.) Testifying that Giarrusso's vacation began in late February (Tr. 2:228), Shop Maintenance Manager Canady identified a timecard (R. Exh. 15), showing "On Vacation" the week ending Saturday, March 3, as Giarrusso's. (Tr. 2:238–240.) I find that Giarrusso's vacation was the week of Monday, February 26.

Giarrusso acknowledges that before he left for vacation he had been working with certain 5-gallon cans of paint and that Canady had instructed him to store them before he left for vacation. Giarrusso asserts that he put them in his storage bin before leaving for his vacation. (Tr. 1:107–108.)

Canady testified that Giarrusso had been painting containers, or trash dumpsters. During Giarrusso's vacation, Company removed the roof (replacing it, presumably) from the building which houses the wash and painting bay. Duane Bote, an employee engaged in the roof removal project, informed Canady that there were some paint supplies inside. Proceeding to the wash/paint bay, Canady found three 5-gallon paint cans (blue paint, brown paint, and thinner) open, with some 2 gallons in each, and full of debris and water. These were the supplies Canady had instructed Giarrusso to store. (Tr. 2:230–231, 249.)

Backhoe operator Theodore Bell testified that while Giarrusso was on vacation he observed one 5-gallon can of paint by the dumpsters Giarrusso had been painting. The lid was lying on top, but it was not snapped shut. The Company employs temporary employees hired from a labor pool source, and Bell has seen labor pool employees painting. Everyone has access to the area, and labor pool employees work there sweeping and whatever. During that week Company had some labor pool employees in the wash/paint bay area. (Tr. 1:142–148.) Canady denies that the Company hired any labor pool employees to paint that week. (Tr. 2:255.) According to Canady, the paint is stored under lock and key in a separate yard down the street and Canady has the key. Moreover, Canady testified, Giarrusso did not store paint at some different location. (Tr. 2:250.)

To the Company, Bell's testimony about seeing the can of paint corroborates Canady's testimony of damaged paint supplies. (Br. 7, 24.) General Counsel appears to suggest (Br. 13) that the single paint can, even if left by Giarrusso, was seized on and multiplied by the Company as a pretext for creating the documentation preliminary to an unlawfully motivated discharge.

When Giarrusso returned to work on Monday, March 5, he was notified to report to Canady. When Giarrusso was seated in Canady's office, Canady gave him a written warning to read and sign. (Tr. 1:103; 2:235.) After reading the warning, Giarrusso testified, he exclaimed: "I'm not signing it. It's false." Canady responded, "If you don't sign it, you're fired." After telling Canady to "shove it," Giarrusso rose, went to the parking lot, got in his car, and drove to the office. As Giarrusso was ascending the stairs to Wynberg's office, Canady was descending. Canady, Giarrusso testified, laughed in Giarrusso's face as they passed. Finding Wynberg, with Norman James present, Giarrusso asked if he could speak with them and if they knew what had happened. They ignored him, Giarrusso testified. Telling them they needed to grow up, Giarrusso departed and apparently has not returned. In Giarrusso's opinion the warning was a "setup because of my union activities prior to coming to Cape Coral Disposal and BFI." (Tr. 1:102–104.)

Canady asserts that Giarrusso, in crude language, asked what was going on and what were Canady and Wynberg try-

ing to do,⁵ that he was tired of this and that he quit.⁶ Pointing out that it was only a written warning, Canady told Giarrusso there was no reason for him to get carried away. Giarrusso refused to sign, got up, and left. At no time, according to Canady, did he tell Giarrusso that if he refused to sign he would be terminated. (Tr. 2:235, 250.) To the extent the versions differ, such as with the threat of discharge for refusal to sign, I credit Giarrusso who testified persuasively in contrast with Canady.

Perhaps because he neither signed nor waited around, Giarrusso did not receive a copy of the warning. (Tr. 1:105.) Canady identified (Tr. 2:231–234) the following as the warning (R. Exh. 10), and Giarrusso concedes that it could be. (Tr. 1:113.) I find it to be the one tendered that March 5 to Giarrusso. Dated March 5, and referencing Giarrusso, the “offense” text reads:

Instructed to put paint and supplies back into proper places. Found that employee failed to do what he was instructed to do. Employee was instructed approx 1 week prior to his vacation. Paint and supplies are still not put up. Due to the fact of being left out over expanded period of time with items open and being in the weather, items are now no good for use.

For course of action, Canady wrote, “First warning. Second warning may be grounds for termination.” Canady signed over the date of “3–5–90.” Later Canady added, “After the reading of this notice employee terminated himself.” (Tr. 2:233.)

Canady testified that (in calling Giarrusso in for the warning) he did not intend to terminate Giarrusso. According to Canady, he had no knowledge that Giarrusso was involved in any union activity. (Tr. 2:242.)

According to Wynberg, when Giarrusso came to his office Giarrusso told James that he liked him but was not going to put up with this “bullshit” and was quitting. As Giarrusso started to leave, Wynberg said, “Bob, what’s the problem? Can we sit and talk about this?” “No,” replied Giarrusso, “you guys need to grow up, and I’m not going to work here.” At that point Giarrusso left. (Tr. 2:318–319.) Giarrusso denies telling Wynberg or anyone that he was quitting, and testified that he was unable to find work until October, depending on loans to survive. (Tr. 2:336–337.) As Giarrusso testified persuasively, and Wynberg unpersuasively, I credit Giarrusso’s version that Wynberg and James ignored him. I find Wynberg’s stilted and phony-ring version to be a blatant fabrication.

From Roger Edwards’ (Briggs’ predecessor) February 12 remark-question to Giarrusso, we know that the Company had learned of the February 10 union meeting and, based on its awareness of Giarrusso’s background with the Teamsters, obviously had concluded (erroneously) that Giarrusso was responsible for the union meeting and activity. Second, Giarrusso’s uncontradicted testimony, which I credit, is that before February 10 Company Manager Norman James, who knew Giarrusso had been a member of Teamsters Local 560,

would joke with Giarrusso about union members. That banter abruptly stopped after the February 10 union meeting. In short, with Company itself now being organized, management no longer considered unions something to joke about.

On Tuesday, February 27, the second day of Giarrusso’s vacation, the Union filed its representation election petition in Case 12–RC–7265. Although the record does not contain a copy of NLRB Region 12’s notification letter transmitting a copy of the petition to Company, I officially note that Agency procedure specifies that such notification is to be sent to the employer “immediately.” Casehandling Manual (Part Two) ULP, section 11008 (Sept. 1989). See McGuinness & Norris, *How to Take a Case Before the NLRB* 96 (5th ed. 1986), BNA. The presumption is that the government agency followed its published operating procedures. Assuming that the notification was mailed to the Company no later than Wednesday (and probably the same Tuesday filing day), I further find that in the due course of the mail the Company easily would have received the notice by Friday, March 2, and probably by Thursday, March 1. That brings this summary to the testimony of Billy Ray Dickey.

A welder for Company from 1980 until he quit in April 1991 (Tr. 1:121–122, 125), Dickey describes a conversation he had with then Operations Manager Edwards on either Wednesday or Thursday of the week Giarrusso was on vacation. Although Dickey places the date as March 7 or 8 based on his recollection that Giarrusso returned from vacation on March 12 (Tr. 1:122, 126, 129, 131), he concedes that the date could have been a week earlier. (Tr. 1:131.) The two things Dickey does remember are, first, that the conversation occurred either Wednesday or Thursday, and probably Thursday (March 1), of the week that Giarrusso was on vacation (Tr. 1:132–133), and, second, what Edwards said. I find that the date was Thursday, March 1, 1990.

Dickey asserts that Edwards, with whom he was on friendly terms (Tr. 1:124), spoke to him in the welding shop about 3:30 p.m. that Thursday. Edwards said he would have to get up early the next day (Friday) because it looked as if there would be a picket line at the Company the next morning. “I have to go home and get my .45 and come back out here to keep these trucks rolling,” Edwards added that, “If it hadn’t been for Bob Russo,” there would be no union problem.⁷ But, Edwards continued, “we’re going to get rid of him anyhow when he gets back off vacation.” The conversation ended with Dickey cautioning Edwards to be careful because pickets had a legal right to walk in the street and Edwards replying that the trucks were going to roll. (Tr. 1:123, 133.) Dickey thought it strange that any picketing would begin on a Friday. (Tr. 1:132–133.) No picketing occurred then or later. (Tr. 1:132–133.) Theodore Bell overheard part of the conversation when Edwards stated that the trucks were going to roll. (Tr. 1:138–139.)

Crediting Dickey and Bell, I find that Edwards spoke as Dickey reports. Edwards’ reference to Bob “Russo” is ambiguous because it can be interpreted in either of two ways. First, it could mean that the Company was going to get rid of Giarrusso because of its suspicion that he, as a longtime Teamsters member, had brought the Teamsters to the Com-

⁵On cross-examination, Canady concedes that his May 22 pretrial affidavit, which covers the conversation, does not quote Giarrusso as saying anything about Wynberg. (Tr. 2:252, 254.)

⁶On rebuttal Giarrusso denies telling anyone that he was quitting. (Tr. 2:236.)

⁷Although the record does not show that Giarrusso had the nickname “Russo,” it is a natural shortening of his name. I find that “Russo” refers to Giarrusso.

pany and that the Company had found a pretext to justify discharging Giarrusso. Second, the remark could mean no more than that Giarrusso had committed a major error for which he would have to be discharged. A third possibility, a layoff based on economic considerations, does not seem implied by the “get rid of” language.

Despite the surface ambiguity in Edwards’ threat, I find that the union-motive interpretation is the correct one. First, as Edwards was outside Canady’s department, and they were not on good speaking terms anyhow (Tr. 2:241), it means that there was some discussion among management (including Wynberg and James) about Giarrusso. Second, the “we’re going to get rid of him” threat reveals a plan by management to discharge Giarrusso. As we know, Canady gave Giarrusso a written warning, not a termination slip. But a written warning is consistent with a scheme to provide a documented pretext for discharge. Although, as Giarrusso testified (Tr. 1:104, 114), the Cape Coral district and predecessor company had not previously used written warnings, in the Fort Myers District, which Wynberg had been managing for BFI since January 1986 (Tr. 2:231), written “Employee Action Notification” forms (R. Exhs. 18–21) were used.

Finally, Edwards’ discharge threat came immediately after he had named Giarrusso as the source of the union organizing. Although the two remarks are not necessarily cause and effect, they are consistent with cause and effect. In light of the context and all the circumstances, I find that the cause-effect link is the correct explanation. Thus, I find that on March 1, 1990, the Company, through Edwards, revealed to welder Dickey that the Company planned to discharge Giarrusso because it suspected he was responsible for union activity among its Cape Coral employees. I do not find Edwards’ threat to be an unfair labor practice because the complaint does not allege the threat to be unlawful.

Canady supervised eight employees. He concedes that the written warning which he gave Giarrusso was the first written warning he had ever issued. (Tr. 2:246.) The Cape Coral “Company Policy” rules (R. Exh. 17), which Giarrusso apparently signed at his May 10, 1988 hiring (Tr. 2:296), mostly pertain to drivers and contain nothing about warnings or a disciplinary system, other than advising that a violation will subject the employee to termination.

Wynberg testified that when he met with the Cape Coral employees at a company barbeque following BFI’s acquisition of Cape Coral, he told them, among other things, that BFI would keep Cape Coral’s work rules, because they closely mirrored BFI’s, and simply add to them while contemporaneously notifying the employees of any additions or changes. (Tr. 2:290, 293–294.) BFI policies that Giarrusso (and presumably the others) signed after the acquisition, pertain to safety. (R. Exhs. 8, 9.) Although referring generally to disciplinary action for violating a safety rule, no description of any disciplinary system is stated.

Despite the absence of any reference in the written policies to a disciplinary system, Canady testified that a supervisor first gives “verbal” (oral) warnings and then written warnings. (Tr. 2:247, 256.) These oral warnings are disciplinary, Canady testified. (Tr. 2:258.) Indeed, according to Canady, before the March 5 written warning to Giarrusso, Canady twice had orally warned Giarrusso. The first incident occurred in 1989 when Giarrusso was failing to clean the trucks properly and refusing to clean the undercarriages. (Tr.

2:256–257.) The second, in January 1990, involved a radio. On cross-examination, Giarrusso was not asked about the truck-washing warning, nor did the General Counsel ask when calling Giarrusso as a rebuttal witness. Although I find Canady as a less-than-credible witness, I accept his uncontradicted testimony to the extent that in 1989 he orally reprimanded Giarrusso concerning his truck-washing job performance.

In the January incident, Canady instructed Giarrusso to remove certain items, including a radio, from a rental trailer before the Company returned the trailer. (Tr. 2:222–223, 248.) Giarrusso acknowledges this. (Tr. 1:114.) According to Canady, Giarrusso failed to remove the items and when Canady finally got the radio and other items back they were useless, having been severely damaged in a fire that burned the rental trailer. When Canady informed Giarrusso of the fire destruction, Giarrusso supposedly shrugged it off with, “Oh, well.” (Tr. 2:223–227.) Asked about this on cross-examination, Giarrusso denied the accusation, stating that he did remove the radio and other items, and agrees (in response to a question) that a “Company official” testifying otherwise would be lying. Giarrusso asserts that he knows nothing about a burned radio. (Tr. 1:115.)

Initially on cross-examination Canady testified that Giarrusso had received no disciplinary action by leaving the articles on the trailer. (Tr. 2:247.) Later, he classified this as one of the two oral warnings preliminary to a written warning (Tr. 2:256), concluding by declaring that oral warnings are considered a form of disciplinary action. (Tr. 2:258.) Recall that the written warning itself states that it is the first warning. Although the General Counsel describes these statements as changes by Canady in his testimony (Br. at 5–6), I note the possibility that Canady, when first asserting that Giarrusso received no disciplinary action for leaving the radio and other items on the rental trailer (Tr. 2:247), could have meant Giarrusso received no *written* warning.

In any event, I credit Giarrusso. Thus, I find that at the hearing Canady in bad faith sought to establish that Giarrusso had failed to remove the radio and other items knowing that Giarrusso had removed the items. Whatever burned radio Canady displayed at the hearing (Tr. 2:225–226), I find that it was not the radio which Canady asked Giarrusso to remove from a trailer in January 1990.

One final factual point remains for mention. On the Friday during his vacation, that is, on Friday, March 2, Giarrusso returned to Cape Coral to get his paycheck. While there he spoke with Canady who told Giarrusso his new hours would begin and end later in the day. (Tr. 1:101–102.) When later taking the stand, Canady did not challenge Giarrusso’s testimony on this. Thus, although Canady implies that it was early that week when the paint supplies were discovered exposed to the roof debris and then to the weather, on Friday of that week he said nothing about it to Giarrusso when they talked. Nevertheless, I attach no weight to this because, as I have found the day before, March 1, Edwards revealed to Dickey that the Company planned to fire Giarrusso when he returned from vacation. For whatever reason, on Friday, March 2, Canady elected not to mention the ruined paint to Giarrusso, reserving that as a surprise for Monday, March 5.

Turning now to the March 5 warning, I observe, first, that Canady, failing to ask Giarrusso for an explanation, simply presented Giarrusso with a *fait accompli*. Second, there is no

designated space for an employee's signature. Third, there is no industrial due process language that by signing the employee simply is acknowledging that he has read and understands (and does not admit guilt). Nor is there any designated section for remarks where the employee can write his version, denial, or protest. Contrast these omissions with those standard fairness provisions present with the warning form in *Interlink Cable Systems*, 285 NLRB 304, 306-307 (1987).

Considering all the circumstances, I find that Company fabricated the paint damage. Either the damage never happened, or if did the Company planted the open cans of paint there (possibly including the can Bell observed) knowing full well the paint would be contaminated by the falling debris when workers tore off the roof, all as a fraudulent pretext for initiating the steps to discharge Giarrusso. Company did this, I find, because it suspected Giarrusso was responsible for the union meeting of February 10, 1990, at the Jaycees' park. The first step was to be a written warning. When Giarrusso recoiled at the instruction to sign what Giarrusso recognized as a lie, Canady seized the opportunity to impose a Hobson's choice: Sign (the lie) or be fired.

Rather than sign a lie, one serving notice that the next misstep (pretext) may be grounds for termination, Giarrusso left. Whether Giarrusso intended from that moment to appeal to Wynberg, or thought of that after reaching his car, is not specified in the record. But when Giarrusso appealed to Wynberg (after Canady laughed in Giarrusso's face when they passed on the stairs), Wynberg and James ignored him, as if pretending Giarrusso did not even exist.

c. Analysis and conclusions

Company argues that Canady had no knowledge of Giarrusso's past or present union activities. That knowledge, I find, came through James and Wynberg. The February 12 interrogation by Edwards reveals that Company's management had quickly learned of the February 10 union meeting. Given the obvious discussion among management about it and Giarrusso, and the absence of any evidence that Respondent had excluded Canady from its discussion of one of Canady's employees, I infer that Canady was told what Company had learned and what it suspected. I also infer knowledge from the pretextual nature of Giarrusso's discharge. Under established Board law the same set of circumstances may be relied on to support both an inference of knowledge and an inference of discrimination. *A. J. Ross Logistics*, 283 NLRB 410, 414 (1987).

As I have found, the March 5 written warning was unlawfully motivated. Recognizing the written warning (presented as a *fait accompli*) as a fraudulent attempt to penalize him for his union activities and to set him up for a future discharge, Giarrusso rejected Canady's command to sign or be fired. Canady's instruction was an implied command to choose either union activity or continued employment. This Hobson's choice constitutes a constructive discharge under the Act. See *NLRB v. CER*, 762 F.2d 482 (5th Cir. 1985), *enfg.* 269 NLRB 1070 (1984). See also *Control Services*, 303 NLRB 481, 484 (1991).

Citing *Interlink Cable Systems*, 285 NLRB 304 (1986), Company argues that an employee's refusal to sign a disciplinary warning is unprotected activity for which the employee may be discharged. Unlike here, in *Interlink* the warn-

ing was not alleged to be unlawfully motivated. *Interlink* is not apposite.

The Board classifies "set-up" terminations as discharges rather than constructive discharges, but, in either event, threats both as 8(a)(3) violations. *Reno Hilton*, 282 NLRB 819, 836 fn. 39 (1987). By the terms of Canady's order, Giarrusso's discharge followed from his failure to sign the warning. At least Giarrusso reasonably would have believed he was fired when he refused to sign and left. Canady at first wrote that Giarrusso had "terminated himself," later writing on the timecard that Giarrusso had "Quit."

I find that by terminating Giarrusso on March 5, 1990, the Company violated Section 8(a)(3) of the Act, as alleged. I shall order the Company to offer Giarrusso full and immediate reinstatement and to make him whole, with interest.

2. Thomas Lento

a. Introduction

Complaint paragraph 12(c) alleges that the Company, by Larry Wynberg, discharged Thomas Lento about April 11. Denying the allegation in its answer, the Company's position expressed at the hearing and on brief is that Lento was terminated for nondiscriminatory reasons. An April 12 letter from Operations Manager Briggs, confirming Lento's termination the day before, reads (G.C. Exh. 8; Tr. 1:41-42):

On Tuesday, April 10, 1990 you did not complete your daily route, you said you were tired and did not like to throw garbage. This is no excuse, this is a garbage company and from time to time we all have to throw garbage.

Your attitude toward Marilyn and the company was unacceptable. We will not tolerate our employees telling us what they will and will not do, especially in front of other employees.

Per your conversation with Marilyn the company feels that you voluntarily quit. You came into the office and told Marilyn that you would not throw any more garbage. You also did not dump your truck, complete your paperwork or punch out for the day.

As of April 11, 1990 your employment with BFI Waste Systems is terminated. You may receive your last check when all company keys, uniforms, gloves etc. . . . are turned in.

b. Facts

(1) April 10, 1990

The events giving rise to Lento's discharge occurred April 10, a Tuesday. Recall that a few days earlier the Company had received the Union's letter (G.C. Exh. 5) announcing the names of 10 of the Union's supporters, with Lento's name heading the list.

On April 10, as he had for the past several days, Timothy Blackburn was riding with Lento in order to learn the route and its larger truck. (Tr. 2:201-202, 207.) Blackburn had applied for transfer to the Company's Fort Myers Beach recycling plant where his wife works. By the time of the hearing, he apparently had made the transfer. (Tr. 2:207-208.) The witnesses dispute the key events, with Lento opposed by Blackburn, dispatcher Marilyn Richardson, Route Supervisor

J. Robert Tillman, and Shop Maintenance Supervisor Charles Canady. A brief summary of their testimony appears below.

References below to VCR reports (vehicle condition reports) require some explanation. This form (R. Exh. 4) has three main sections. One is a pretrip inspection list where the driver checks off 14 items as being in proper working order or with any defects noted below. In a designated space the driver signs and dates the pretrip inspection section. The second section is a posttrip inspection report covering the same items, also with a space for the driver to sign and date. The third section, which covers most of the bottom half of the form, consists of boxes for noting vehicle defects or damage.

The Company's written policy (R. Exh. 3) states that disciplinary action "will be taken" for any failure to complete VCR reports. Lento was aware of this policy and that the driver is to fill out the VCRs. (Tr. 1:49–50.) The April 10 VCR for Lento's vehicle has only the pretrip inspection portion completed and signed by Lento. The posttrip inspection is untouched. (R. Exh. 4.) Lento explains that as the driver he normally filled out the VCR. On April 10 he did the pretrip portion because he thought he would be driving. Because he later (as we shall see) was told to let Timothy Blackburn drive, Lento did not fill out the posttrip inspection portion. (Tr. 1:53, 78.)

Blackburn testified that on April 9 he advised Tillman that he needed to leave early the afternoon of April 10 because he had to appear in court. (Tr. 2:203, 205.) As Blackburn and Lento pulled into the yard in the early afternoon after work on April 10, Blackburn informed Lento that he had to leave then. (Tr. 2:203.) Blackburn denies that he was scheduled to take his DOT driving test that April 10 (Tr. 2:202), explaining that he took that test of May 28, 1990, after his 1989 medical and written examinations. (Tr. 2:211.) Although he searched, Blackburn could not find his court papers. (Tr. 2:204–205.) No party offered evidence of any contact with the clerk's office at the courthouse for the purpose of locating the case number and papers Blackburn was referring to.

Blackburn confirms that about 3 weeks after Lento's discharge he, Blackburn, gave a written statement to a company official. In his pretrial statement Blackburn reports that on April 10 he clocked out at 1:23 p.m., and that it was after he and Lento had returned to the yard *that day* (April 10) that he asked Tillman if he could be excused from accompanying Lento to the landfill to dump the truck. Tillman excused him when Blackburn explained that he had to meet with his lawyer regarding certain child support matters. (Tr. 2:215–216.)

Tillman denies telling Lento in the morning that Blackburn would be taking his DOT driving test that afternoon. According to Tillman, he had no reason to say that because he thought Blackburn already was certified, although he concedes he had no information that Blackburn was certified. (Tr. 2:176–177, 190.) When Lento and Blackburn returned around 1 p.m., Tillman testified, he told Lento to empty the truck. They were standing by the door to the office. Tillman told Lento to dump the truck because he knew that Blackburn had to leave for a court appointment. (Tr. 2:177–178, 190, 192.)

Richardson testified that she overheard Tillman tell Lento to take the truck to the landfill. Lento said nothing, and walked into the dispatch office while Tillman left on a busi-

ness errand. (Tr. 2:159, 162, 164–165.) According to Richardson, Lento came in and stood by her desk for a moment. Richardson asked Lento if he had taken his truck to the landfill. She knew Lento had not done so, it being only seconds after the conversation she overheard, but Lento had his timecard in his hand and it appeared Lento was not going to comply with Tillman's instruction. Lento replied, "This is bullshit. I don't have to take the truck to the landfill. I ain't taking that truck." Lento added that he had been the helper throwing the trash and it was not his responsibility to drive the truck to the landfill. Richardson told Lento that he had to do so because Blackburn had to leave, the truck has to be dumped, and that "Jay" (Tillman) had told him to take the truck. Angry, Lento walked out. A few minutes later Richardson radioed Tillman to report that Lento was refusing to dump his truck. From that point Tillman handled the matter. (Tr. 2:158–169.)

Tillman returned to the yard, found the loaded truck, saw that Lento was gone, and observed that Lento's timecard (R. Exh. 7) had not been punched out. Tillman reported these matters to Operations Manager Briggs. (Tr. 2:178, 192–194.)

Canady testified that about midafternoon Lento, looking depressed, came into his office and sat down. Canady and Carter Goodman (Route Supervisor Eddie Carter Goodman Jr.), who was present, asked Lento what was wrong. Lento said he was tired of *driving* and was not going to the landfill. Lento then rose and left. Afterwards Canady, in the course of his duties, discovered that the VCR had not been submitted. Locating the VCR in the truck, Canady discovered (the incomplete) RX 4 and observed that the truck had not been dumped. (Tr. 2:242–245.) In a pretrial statement of May 20, 1990, Canady states that Lento said "I'm tired of throwing garbage." Claiming that his mind was not straight at the time because "so many things were happening," Canady asserts that the "throwing garbage" words are incorrect and that the quote should read, "I'm tired of driving." (Tr. 2:251–253.)

Goodman, when called by the Company, briefly testified about one point on direct examination, that he was not scheduled to take Blackburn for his DOT road test on April 10. (Tr. 2:218.) He was not asked about what Lento said in Canady's office on April 10. On cross-examination Goodman declared that in March–April 1990 he was unaware of any union organizing campaign at the Cape Coral facility. (Tr. 2:219.)

Lento testified that Blackburn drove all day while he, Lento, pitched the trash (Tr. 1:33, 37, 51, 61, 79, 81), that he did not take the truck to the landfill because both Blackburn (Tr. 1:54, 61, 82–83) and Route Supervisor Tillman (Tr. 1:63–64, 81) told him that Blackburn would take his DOT (Department of Transportation) road test that afternoon, and that he did not complete the paperwork because the driver does so and he, Lento, did not drive. (Tr. 1:37, 51.) Lento denies that Tillman told him to take the truck to the landfill (Tr. 1:58–59), and denies that Richardson reminded him of Tillman's instruction that he take the truck to the landfill because Blackburn had left for a court setting. (Tr. 1:59.) Lento recalls that it was a day earlier when Blackburn left early for a court appointment. (Tr. 1:54, 83.)

Lento testified that on returning to the yard he went inside the dispatch office where he asked dispatcher Richardson if Larry Wynberg or David Briggs was in, that he wanted to

talk with one. Apparently hot and dirty, Lento was perspiring from his work that day. "What's the problem, Tom?" Richardson inquired. Lento replied, "I can't take throwing trash anymore. I'd like to talk to them about it." When Richardson informed him that neither was in, Lento left and, after washing up, he "hung around" for awhile. (Tr. 1:59, 80.) (According to his April 18 pretrial affidavit, R. Exh. 5, Lento remained at the shop for about 30 minutes. Tr. 1:53.)

Lento testified that when he and Blackburn completed their work that day Blackburn stated that he was going for his DOT driving test. Lento (apparently during the half hour he "hung around" at the shop) observed that Carter Goodman was sitting in the shop. (Tr. 1:59, 80-83.) Indeed, Lento asserts that Goodman was in the shop "all day" waiting to take Blackburn to the landfill as the driving test. (Tr. 1:63.) Acknowledging that a driver must be DOT certified to take a truck to the landfill, and that he knew Blackburn was not so certified, Lento asserts that the requirement was to be met by Supervisor Goodman's accompanying Blackburn there as Blackburn's DOT driving test. (Tr. 1:62-63.) Driver Donald Stahl testified that after Lento was terminated Blackburn took over Lento's route. (Tr. 2:333-334.) Presumably that means Blackburn also took the truck to the landfill, although Stahl did not expressly so testify.

On April 10 Operations Manager Briggs wrote on the reverse side of Lento's attendance card (Tr. 2:275-277, 342-343):

Tom did not complete route or paperwork for the day. Also complained about throwing garbage to Marilyn and said he was not going to do it any more. *Voluntarily quit.* D.B.

After his employment ended at the Company, Lento filed a claim for unemployment compensation. The record does not disclose the date of filing. Apparently the Company contested the claim, for on May 7 Lento signed (Tr.1:56) a "rebuttal" statement (R Exh. 6), taken by the Florida agency, reading:

I worked as a driver for B.F.I. of Cape Coral from 6-1-89 thru 4-10-90.

I did not tell the dispatcher that I wasn't going to throw any more garbage. I told the dispatcher I wanted to see Larry Weinberg, dist. mgr. & David Briggs, oper. mgr., about throwing garbage & staying on the back of the truck since I had been hired as a driver. I didn't dump the truck because I wasn't the driver. The driver was Tim Blackburn. He didn't dump it because Carter, supv., told him to park the truck & go home. This was all a set-up to get at me because I organized a union. I could have sworn I punched out, but Larry wouldn't give me the timecard to see. I didn't do the paperwork because that's the driver's responsibility.

Respecting the information that Route Supervisor Carter Goodman told Blackburn to park the truck and go home (information not given by Lento in his earlier pretrial affidavit), Lento explains that employee Gus Sardinas reported that fact to him after Lento had given his April 18 pretrial affidavit. (Tr. 1:57, 85-90.)

(2) April 11, 1990

Following a drivers' meeting the early morning of April 11, District Manager Larry Wynberg and Operations Manager David Briggs met with driver Lento in the dispatch/front office. Lento had not been able to punch in because Wynberg had his timecard. (Tr. 1:35-36; 2:278, 302.) Wynberg testified that he already had received a preliminary report, including Lento's timecard, from Briggs concerning the events of the previous day. (Tr. 2:328-329.)

Lento testified that Wynberg began their meeting by stating (Tr. 1:36):

Tom Lento, what are we going to do with Tom Lento? He didn't punch his timecard in. He didn't dump his truck. And he didn't fill out his driver's sheet. I guess he walked off the job.

Even if he did not punch out, Lento replied, it was not the first time he had made that mistake, and previously the morning supervisor would mark it with a pen and punch it himself when the drivers forgot. (Tr. 1:36-37.) (Lento testified that Supervisor Tillman had done so as had Roger Edwards, the former operations manager, with Edwards adding a curt reminder not to let it happen again. Tr. 1:75-77.) Continuing, Lento said the reason he did not dump the truck or complete the paperwork is that he did not drive that day. (Tr. 1:37.)

At that point Wynberg switched subjects to the Union, remarking that ever since "this union thing" Lento had been a problem to the Company whereas Lento had never before been a problem. Employees, Wynberg stated, are complaining that he was scaring them; that Lento was handing out paperwork to the employees (Lento distributed union campaign literature, Tr.1:40-41); and that Lento was costing the Company a lot of money by trying to form a union. Why was Wynberg pointing at him, Lento asked, when there are more involved than just him. (Tr. 1:37.)

Wynberg then asked, "Do you believe in BFI or do you believe in the Union?" Lento answered that he did not believe in BFI and at that point did not even believe in the Union because he did not know which was lying (an apparent reference to campaign propaganda by both sides), but he had been a union member for 6 years and liked the idea of a union. Wynberg then stated (Tr. 1:38): "Well, if you believe in the Union, you can't be trusted with BFI."

Earlier, I postponed discussion of complaint paragraph 9 which alleges an April 11 discharge threat by Wynberg. In the Government's posthearing brief, the General Counsel does not pause to enlighten me on what statement the Government contends supports the allegation, merely asserting that Wynberg's remarks to Lento during their early morning meeting that day violated Section 8(a)(1). (Br. 20.) The statement quoted above apparently is the support for the allegation.

Wynberg told Lento to call him at 2 p.m. that day and he would give him a decision on whether Lento could return to work. Wynberg said that he might hurt himself if he let Lento go (discharged him), or he could be better off by terminating Lento. Lento replied that he would come back at 2 p.m. to receive the decision in person. (Tr. 1:38.)

Around 2 p.m. that day, Lento returned and asked Wynberg if he could punch in the following day. Wynberg

said that Lento already knew the answer because he had called Wynberg's boss. Not so, replied Lento. "You no longer work here," Wynberg told Lento. When Lento then asked for his paycheck, Wynberg told him to come back Friday with his uniforms and material that belong to the Company and that he would be paid whatever he was owed. Lento testified that he did not call Wynberg's boss, has no idea who is Wynberg's superior, and called no one. On cross-examination Lento concedes that he does not know whether he had his uniforms with him when he returned that afternoon. (Tr. 1:39, 71-73.)

Wynberg (Tr. 2:303) and Briggs (Tr. 2:268) testified that it was Lento who began the meeting by stating: "I guess you've got me by the balls. I didn't complete my paperwork or punch out or dump the truck." Wynberg's version has Lento adding, "I take it that your're going to terminate me." (Tr. 2:303.)

Briggs and Wynberg responded by telling Lento that the Company could not have employees failing or refusing to follow instructions. Wynberg said he had not made a decision to terminate Lento, and he needed to look at a few more of the facts. If, however, Lento had refused to dump the truck, finish his paperwork, and punch out, then Wynberg felt that was cause for termination and that Lento, by defying authority, had walked off the job and quit. The meeting concluded with a 2 p.m. appointment. Briggs denies that Wynberg mentioned union activities. (Tr. 2:268-269, 303-304.)

On-cross examination, Wynberg testified that later in the morning meeting he asked Lento if he had anything to add. Conceding his awareness that Lento favored the Union, Wynberg denies that Lento's union activities were mentioned. He asserts, however, that Lento said, "I know you are firing me because of the Union," which Wynberg then denied, telling Lento they would not discuss the Union because it had nothing to do with the case. (Tr. 2:329-330.)

Following the early morning meeting with Lento, Wynberg began collecting the facts, speaking with the dispatcher and the supervisors. Because of Lento's union connection, and to avoid putting the Company at legal risk, Wynberg, with Briggs present, telephoned his superior in Atlanta, Neil Clark, for consultation. At the conclusion of his investigation, Wynberg decided to terminate Lento. (Tr. 2:273, 304-306.) For Wynberg, the deciding factor was Supervisor Tillman's report, supported by evidence from dispatcher Richardson and Supervisor Canady, that Lento had deliberately disobeyed orders and standing instructions. (Tr. 2:330-332.)

Wynberg testified that the Company terminated three drivers in the Fort Myers' District, a nonunion setting, for similar reasons: Robert Birchfield in September 1989; James Boye in April 1988; and Johnny Goodman in May 1986. Birchfield walked off the job after expressing a dislike for a work assignment (R. Exhs. 18, 19); Boye left the job before completing the shift (R. Exh. 20) as did Goodman (R. Exh. 21). (Tr. 2:307-317.)

Briggs (Tr. 2:270) and Wynberg (Tr. 2:306) testified that Lento was carrying his uniforms when he returned at 2 p.m. (Briggs does not explain why his April 12 termination letter to Lento, quoted earlier, refers in the last paragraph to return of uniforms.) Seeing that, Wynberg "smiled" and "chuckled" to himself, thinking Lento must know that he is being terminated. (Tr. 2:306.) When Lento came in and inquired,

Wynberg informed him that the decision was termination. Lento asserted that he would be back at work Monday morning after a couple of calls. (Tr. 2:270-271, 307.)

On rebuttal Lento denied that he intended to quit on April 10 or 11, that during the organizing campaign the union representative told him to be careful so as to protect his job, that Lento's wife was pregnant, giving birth on April 12 (implying a family need to keep working), and that on April 10 no supervisor told him to go to the landfill. (Tr. 2:339.) Earlier Lento testified that neither Tillman nor dispatcher Richardson had told him to take the truck to the landfill. (Tr. 1:58-60.)

c. Analysis and conclusions

Arguing that Lento should be credited, the General Counsel contends that Lento's discharge was pretextual, with the real reason for Lento's discharge being exposed by Wynberg's April 11 remarks to Lento. Previously not a problem to Company, Lento now was costing the Company a lot of money over the Union, and Lento no longer could be trusted because he believed in the Union. (Br. at 18.)

Countering that Lento should be discredited and its witnesses credited, the Company argues that Lento's motive for his odd behavior on April 10 was the fact he had been required to throw garbage for a substantial portion of the day and was probably tired of doing so. On returning to the facility and learning that he also would have to take the truck to the landfill "he became extremely upset, believed that it was unfair, and decided not to take the truck to the landfill even though he had been ordered to do so by Tillman. Consequently, he refused to fill out the VCR report and decided not to punch out." (Br. 33.)

Finding Thomas Lento a believable witness, and the Company's witnesses unpersuasive, I conclude that the Company violated Section 8(a)(3) and (1) of the Act by discharging Lento on April 12, 1990. I shall order the Company to offer Lento immediate reinstatement and to make him whole, with interest.

This is not to say that all the evidence can be reconciled and that no question remains. Nevertheless, Wynberg's April 11 remarks to Lento reveal the Company's unlawful motive in terminating him. I further find that the Company failed to carry its burden of demonstrating that it would have fired Lento even in the absence of his union activities. Its reasons were either fabricated or pretextual. Lento's failure to punch out on April 10 was a minor failure warranting no more than brusque reminders in the past. Regardless of whatever really happened on April 10 (Lento describes events as a setup in his employment claim rebuttal), I find that supervisor Tillman told Lento to let Blackburn drive, that Blackburn drove the entire shift, that on their return Tillman did not tell Lento to take the truck to the landfill, and that the Company either caused Blackburn to leave without completing the driver's work tasks, or seized on the deficiencies (incomplete VCR and truck not dumped) as an opportunity to get rid of a prominent supporter of the Union.

CONCLUSIONS OF LAW

By interrogations, threats, and disciplinary actions, the Company has engaged in unfair labor practices affecting

commerce withing the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, The Cape Coral District of Browning-Ferris Industries of Florida, Cape Coral, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Promising employees better working conditions, higher wages, and promotions if they will abandon their support of and activities of behalf of the Union.

(c) Impliedly threatening employees with discharge because of their support of and activities on behalf of the Union.

(d) Issuing written disciplinary warnings to employees because of their support of and activities on behalf of the Union.

(e) Discharging or otherwise discriminating against any employee for supporting Teamsters Local Union No. 79, or any other union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Giarrusso and Thomas Lento immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful written warning and the discharge and notify the in writing that this has been done and that the discipline will not be used against them in any way.

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Cape Coral, Florida facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT promise you better working conditions, higher wages, and promotions if you will abandon your support of and activities on behalf of Teamsters Local Union No. 79, or any other union.

WE WILL NOT impliedly threaten you with discharge because of your support of and activities on behalf of Teamsters Local Union No. 79, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local Union No. 79, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

THE CAPE CORAL DISTRICT OF BROWNING-FERRIS INDUSTRIES OF FLORIDA, INC.